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MEMORANDUM

TO: Clerks, United States District Courts

FROM: Robert Lowney *Bob*

Re: Guidance for the Implementation of the Judicial Conference Policy to Make Transcripts of Court Proceedings Available Electronically via Case Management/Electronic Case Files (CM/ECF) (Information Only)

District CM/ECF Release 3.2, which includes the software solution to implement the Judicial Conference's transcript policy, was made available to district courts on December 27, 2007 for testing and review. Courts were advised that four pilot courts are using the new functionality in their live environments through the month of January and are working closely with staff at the Administrative Office to identify any issues that need correction prior to all courts migrating to this release. In conjunction with the availability of the software, we have developed the attached guidance to assist courts in implementing the new policy regarding electronic access to transcripts. Working with the Court Reporters Advisory Group, we are also developing implementation guidance for court reporters, which will be provided to you in the near future.

If you have any questions or comments, please do not hesitate to contact David Scott at 202-502-1582 or via email at David Scott/DCA/AO/USCOURTS.

Attachment

cc: District Court Executives

Guidance for the Implementation of the Judicial Conference Policy On the Availability of Transcripts of Court Proceedings

At its September 2007 session, the Judicial Conference approved a new policy regarding the availability of transcripts of court proceedings and directed the Administrative Office to issue guidance to courts on its implementation. District Case Management/Electronic Case Files (CM/ECF) Release 3.2 includes software that facilitates the implementation of this policy. This document, along with the Release Notes from CM/ECF Release 3.2, is designed to assist courts in complying with the policy. The document has three sections: an Executive Summary, an In-depth Overview of the Process, and General Issues, which answer questions already asked about the policy.

I. Executive Summary

The language from the Judicial Conference's September 2007 session (JCUS - SEP 07, p._) states:

- (1) A transcript provided to a court by a court reporter or transcriber will be available at the office of the clerk of court for inspection only, for a period of 90 days after it is delivered to the clerk.
- (2) During the 90-day period, a copy of the transcript may be obtained from the court reporter or transcriber at the rate established by the Judicial Conference, the transcript will be available within the court for internal use, and an attorney who obtains the transcript from the court reporter or transcriber may obtain remote electronic access to the transcript through the court's CM/ECF system for purposes of creating hyperlinks to the transcript in court filings and for other purposes.
- (3) After the 90-day period has ended, the filed transcript will be available for inspection and copying in the clerk's office and for download from the court's CM/ECF system through the judiciary's PACER system.

In addition, amendments to the Federal Civil and Criminal Rules of Procedure implementing the E-Government Act of 2002's requirement to protect the privacy and security of publicly available electronic filings took effect on December 1, 2007. The amendments to Civil Rule 5.2 and Criminal Rule 49.1 require that personal identification information be redacted from documents filed with the court – individuals' Social Security numbers, names of minor children, financial account numbers, dates of birth, and, in criminal cases, home addresses.¹ As a result, as courts begin to implement the new transcripts access policy, they also need to ensure

¹These rules supersede the redaction requirement of the Judicial Conference privacy policy (JCUS - SEP 03, pp. 15-16).

that the transcripts are compliant with the rules. In 2003, the Judicial Conference approved procedures for applying redaction requirements to transcripts of court proceedings. District CM/ECF Release 3.2 has been designed to include those procedures, which are explained in this document.

Under 28 U.S.C. § 753(b), the court reporter or transcriber must deliver promptly a certified copy of any transcript made to the clerk of court for the records of the court. (See page 8). The Notice of Electronic Filing (NEF) or manual noticing informs parties and attorneys of record of the 90-day restriction and how to obtain the transcript during the restriction period. The date when the transcript is submitted is the starting point for all deadlines related to the transcript.²

During the 90-day period (which may be extended by the court), access to the transcript in CM/ECF is restricted to four types of users:

- court staff;
- public terminal users;
- attorneys of record or parties who have purchased the transcript from the court reporter/transcriber; and
- other persons as directed by the court, e.g., appellate attorneys.

Courts of appeals staff have expressed interest in parties to appeals having the ability to place hyperlinks to district court transcripts (as well as other documents) in their appellate briefs. Except for public terminal viewers, persons authorized to view or download the transcript can also create hyperlinks to the transcript. During the 90-day period, the transcript will include a header “AVAILABLE AT THE PUBLIC TERMINAL FOR VIEWING ONLY” alerting court staff that they may not copy or print the transcript for a requester during the restriction period.

II. Overview of the Process within CM/ECF

The court reporter, transcriber, or clerk will file a Notice of Filing of Official Transcript when a transcript is delivered to the clerk for the court’s records (model notice attached). This notice includes language that indicates that parties have five (5)³ business days to file with the

²Note: the special redaction procedures for transcripts and the 90-day restriction policy apply only to transcripts of federal courtroom proceedings. Other transcripts, such as those of depositions taken outside of court, or of proceedings of state courts or other jurisdictions, may be filed by the parties, and would be subject to the rules and redaction requirements applicable to other filings by parties.

³Currently pending before the Judicial Conference is a recommendation from the Court Administration and Case Management Committee to enlarge this time frame to seven (7) calendar days.

court a Notice of Intent to Request Redaction of this transcript. This notice of filing is transmitted to the parties in the case via the Notice of Electronic Filing (NEF) through CM/ECF or manually by the clerk's office, if the parties are not registered for CM/ECF. Redaction responsibilities apply to the attorneys even if the requestor of the transcript is a judge or a member of the public/media.

Action: Each court must decide how official transcripts will be filed electronically in CM/ECF. Some courts have issued CM/ECF logins to their federal official court reporters. These logins frequently are read-only or have limited filing capabilities. Other courts require delivery of the transcript in electronic format (via email or disc) to the clerk's office for filing by clerk's office personnel. CM/ECF can accommodate either practice. If the court wants the contract court reporter/transcriber to file the transcript directly into CM/ECF, there is a user type of "rep" that allows filing through the outside server, rather than through the inside server that a court user with user type of "crt" would use.

Any party needing to review the transcript for redaction purposes may purchase a copy from the court reporter/transcriber or view the transcript at the courthouse using the public terminal to CM/ECF. If a party purchases the transcript from the court reporter, and he or she is an attorney on the case, he or she will be given remote access to the transcript via CM/ECF and PACER. This access is provided via a utility program in CM/ECF called the Document Access Panel. PACER fees apply at all times when accessing transcripts remotely.

Action: Each court will need to decide who has access to the Document Access Panel for purposes of granting access to transcripts within the first 90 days. Some courts will authorize court reporters to grant remote access to transcripts upon receipt of payment; other courts will authorize clerk's office employees to grant this access upon notification from the court reporter that payment was received. This is a new process that accompanies this functionality in District CM/ECF Release 3.2 and each court must determine how this access will be accommodated in CM/ECF.

Within five business days⁴ of the delivery by the court reporter/transcriber of the official transcript to the clerk's office (or filing in CM/ECF), each party wishing to redact a transcript must inform the court, by filing a notice with the clerk, of the party's intent to redact personal data identifiers, as required by Federal Rule of Criminal Procedure 49.1 and Federal Rule of Civil Procedure 5.2, from the electronic transcript of the court proceeding. In CM/ECF, this event is called the Notice of Intent to Request Redaction. If no such notice is filed within the allotted time, the court will assume redaction of personal data identifiers from the transcript is not necessary.

⁴See Footnote 3.

Unless otherwise ordered by the court, the attorney must review the following portions of the transcript:

- opening and closing statements made on the party's behalf;
- statements of the party;
- the testimony of any witnesses called by the party; and
- any other portion of the transcript as ordered by the court.⁵

(Note: parties should also be instructed to serve the court reporter and/or transcriber with this notice manually, since most courts do not serve court reporters via CM/ECF. This instruction can be relayed to attorneys in the body of the notice of filing.) Only those identifiers listed in the rules can be redacted through this part of the process: Social Security numbers; financial account numbers; names of minor children; dates of birth; and home addresses of individuals.

An attorney serving as “standby” counsel appointed to assist a *pro se* defendant in his or her defense in a criminal case must review the same portions of the transcript as if the *pro se* defendant were his or her client. If the transcript relates to a panel attorney representation pursuant to the Criminal Justice Act (CJA), including serving as standby counsel, the attorney conducting the review is entitled to compensation under the CJA for functions reasonably performed to fulfill the redaction obligation and for reimbursement for related reasonable expenses.

If redaction is requested, a party is to submit to the court reporter or transcriber, within 21 calendar days of the transcript's delivery to the clerk, or longer if a court so orders, a statement indicating where the personal data identifiers to be redacted appear in the transcript. The court reporter or transcriber must redact the identifiers as directed by the party. These procedures are limited to the redaction of the specific personal data identifiers listed in the rules. If an attorney wishes to redact additional information, he or she may make a motion to the court. The transcript will not be electronically available until the court has ruled on any such motion, even though the 90-day restriction period may have ended. These motions should be handled by the court as expeditiously as possible, given the 90-day restriction period as well as the need for access to the transcript by the appellate attorneys and parties.

The court reporter or transcriber must, within 31 calendar days of the delivery of the transcript to the clerk of court, or longer if the court so orders, perform the requested redactions, and file a redacted version of the transcript with the clerk of court. The original unredacted electronic transcript should be retained by the clerk of court as a restricted document. The court

⁵Currently pending before the Judicial Conference is a recommendation from the Court Administration and Case Management Committee to add a requirement that attorneys must specifically review “any transcript of a sentencing proceeding.”

will monitor this deadline to ensure that the redacted transcript is available for the parties and attorneys should there be an appeal.

Action: If the attorneys fail to file the Notice of Intent to Redact, can they still file the Redaction Request within the 21 days from the filing of the original transcript? Courts will need to make a local policy decision on how these requests will be handled. If an attorney files a Notice of Intent to Request Redaction or a motion for extension of time to file this notice, and then doesn't file the Redaction Request, the court will need to take action – either to get the attorney to withdraw the Notice of Intent to Request Redaction or to issue a show cause order as to why he or she hasn't met the deadline.

The transcript pilot courts⁶ reported that very few redactions occurred during the one-year pilot period. If there are redactions, the case file will contain two transcripts that are restricted from remote access during the 90-day period, and the header will appear on both versions. While the redacted transcript will eventually be available for remote access, the unredacted, original transcript will continue to be a restricted document and the header “AVAILABLE AT THE PUBLIC TERMINAL FOR VIEWING ONLY” will continue to appear after the 90-day deadline has expired. Court staff will have access to both documents and attorneys who did not purchase the unredacted version will have access only to the redacted version.

If, at the end of the 90-day restriction period, there are no redaction documents or motions linked to the transcript, CM/ECF can be configured to automatically remove the access restrictions or the court can accomplish this manually by running a new transcript report, Review/Remove Transcript Access Restriction. If, at the end of the 90-day restriction period, there are documents and motions linked to the transcript, CM/ECF will report this using the new transcript report and court staff will remove the access restrictions as appropriate. These functions are described fully in the Release 3.2 Release Notes.

III. General Issues

After conducting pilot projects of the redaction process in 2005-2006 and working with courts who implemented the policy, we have gathered the following collection of general issues that may answer some of your implementation questions.

1. Policy Notes

This policy applies to transcripts made available remotely via CM/ECF and PACER. It does not affect in any way the obligation of the court reporter or transcriber, pursuant to statute,

⁶The five district courts in the pilot were: Kansas, Maine, Nebraska, Alabama-Southern, and Missouri-Eastern.

to promptly deliver to the clerk of court the court reporter's or transcriber's original records of a proceeding or the inclusion of a transcript with the records of the court.

If a party desires to respond to a motion for additional redaction, the court may establish a briefing schedule.

Nothing in this policy creates a private right of action against the court, the staff court reporter, or the contract court reporter/transcriber.

Nothing in this policy changes any rules or policies with respect to sealing or redaction of court records for any other purpose.

This policy does not affect or limit the right of any party (or any other person or entity) to order production of a transcript on an expedited basis. This policy does not affect any court rules or ruling requiring the sealing of materials or the protection of sealed materials.

An attorney appointed pursuant to the Criminal Justice Act (CJA) is entitled to compensation under the CJA for functions performed to fulfill his or her obligations under the policy, including the following: (1) traveling to gain access to the transcript, if needed; (2) reviewing a transcript to determine whether to file notice of intent to redact; (3) filing a notice of intent to redact or a motion for an extension of time; (4) reviewing a transcript to determine the location of information to be requested to be redacted or whether to file a motion for additional redaction; (5) preparing and filing a redaction request or motion; and (6) other actions (including creating pleadings, attending hearings or other follow-up). The attorney is also entitled to reimbursement under the CJA for the costs of obtaining a transcript for purposes of review. If a case involving a CJA representation has already been closed and the original attorney is no longer available, or if standby counsel is no longer available, new counsel may be appointed under the CJA and compensated as outlined above. In the event that the original appointed counsel is still available, but has filed a final voucher for the underlying case, the attorney shall be permitted to file a supplemental voucher for compensation. (This information should be sent to court staff who manage and audit the CJA vouchers).

Extensions of time to comply with the deadlines set forth in these procedures should not be routinely granted, due to the potential for delay of court of appeals proceedings in the event redaction procedures extend beyond 31 days.

2. Deadlines

There are three deadlines in the CM/ECF baseline dictionary events that accompany Release 3.2. and these deadlines are all calculated against the delivery (filing date) of the original transcript. These deadlines are:

- Redaction Request Deadline - 21 calendar days after delivery/filing date;
- Redacted Transcript Request - 31 calendar days after delivery/filing date; and
- Release Transcript - 90 calendar days after delivery/filing date.

A fourth deadline, which courts may decide to establish, is the Notice of Intent to Redact. This deadline, not included in the new baseline dictionary events, is five business days after the filing date.⁷ These deadlines are treated like any other CM/ECF deadlines and may be queried using the Hearings/Deadlines Report.

3. Remote Access and PACER Charges

Charges for access through PACER will accrue during and after the 90-day restriction period. Charges will accrue for the entire transcript rather than being capped at 30 pages. The user will incur PACER charges each time the transcript is accessed even though he or she may have purchased it from the court reporter and obtained remote access through CM/ECF. There will not be a remote free copy of the transcript. When purchasing the transcript from the court reporter, the attorney can receive the original and/or redacted transcript in both paper and/or electronic format. In addition, the transcript policy does not provide for a free copy of the transcripts for the Department of Justice at the clerk's office.

4. Unredacted/Redacted Transcripts

Access privileges for non-court users automatically propagate forward but not backward. In other words, if the attorney purchases the unredacted transcript, and subsequently a redacted transcript is filed, the CM/ECF software will automatically apply the access restrictions of the unredacted transcript onto the redacted transcript when the redacted transcript is docketed, and the attorney will then have access to both documents. However, if an attorney purchases the redacted transcript, he does not automatically acquire access rights to the unredacted version. Court staff may choose to grant this access through a manual process using the Document Access Panel. Both the unredacted and redacted transcripts will be available at the public terminal, for viewing only, but only the redacted version will be available for remote access via PACER at the end of the restriction period, which is 90 days unless otherwise modified by the court.

5. Access for Appellate Attorneys

If an appellate case attorney wants remote access to a transcript within the 90-day restriction period, the attorney is required to purchase the transcript from the court reporter/transcriber, who will inform the court that this transaction has occurred. The district court will need to create a CM/ECF account for the appellate attorney and also use the Document Access Panel to enable remote access to the transcript. The appellate attorney will not be added to the CM/ECF case record. In many instances, the appellate attorney will already have an account in the CM/ECF system.

⁷See Footnote 3.

6. Purchase of the Transcript by the Media

Members of the public, including the news media, who purchase a transcript from the court reporter within the 90-day restriction period, will not be granted remote electronic access during the restriction period. At the end of the restriction period, the public will be provided remote electronic access to the redacted transcript, or, if no redaction was done, to the transcript originally submitted, unless it is under seal.

7. Certification of Transcripts

Court reporters with a login and password to CM/ECF for filing transcripts may use the standard CM/ECF signature block with the /s and typed name to represent their signature as part of the statement that certifies that this transcript is true and correct. In those courts where the court reporter/transcriber does not have a login and password, the court reporter, at the discretion of the court, may also use the /s and typed name or may be required to use a digital signature to certify the transcript before providing it electronically to the clerk's office for filing.

8. Miscellaneous Issues

If only part of the transcript is ordered, an attorney is not responsible for ordering and reviewing other parts of the proceedings. For example, if just testimony is ordered, the attorney need not review the opening and closing remarks conducted by the attorney on behalf of a party.

Court reporters/transcribers are not responsible for the identification of the need for or redaction of transcripts. Redaction will be accomplished only with input from the attorneys who represent the parties in the case. Attorneys are required to list the information to be redacted by page and line number, which will reduce the work and errors on the part of the court reporter/transcriber.

The redaction-related documents (e.g., notice of intent to redact, etc.) should be in the court record to ensure that the changes to the transcript are documented and are available both to the court in which the transcript was created and the appellate court (for potential orders regarding any delay).

There is no obligation on the part of the clerk's office to perform any redaction. Instead, it rests on the attorneys to tell the court reporter where to redact, and on the court reporter to perform the redaction.

If the portion of the transcript being ordered includes voir dire, or other jury information that does not fall within the responsibilities of either party, the court should decide whether that part of the transcript should be restricted from remote electronic public access, or whether the attorneys should be ordered to review it and offer redactions.

Many of the courts in the pilot project modified their transcript order form/ordering procedures so that the notice of a transcript order was given to the other parties in the case, giving all parties notice that a transcript was ordered and redaction activity may be necessary. Otherwise, the next notice that goes out is when the transcript is docketed, and that leaves the five business days⁸ within which to file the Notice of Intent to Redact.

⁸See Footnote 3.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____

_____)
Plaintiff(s))
)
v.)
)
_____)
Defendant(s))
)
)

NOTICE OF FILING OF OFFICIAL TRANSCRIPT

Notice is hereby given that an official transcript of a proceeding has been filed by the court reporter/transcriber in the above-captioned matter. The parties have five (5) business days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days.

Any party needing a copy of the transcript to review for redaction purposes may purchase a copy from the court reporter/transcriber or view the document at the clerk’s office public terminal.

Deputy Clerk (or Court Reporter)

Date: _____

Certificate of Service

I hereby certify that on ____ (Date) ____, I electronically served the foregoing on the parties in this matter using the CM/ECF system, which will send notification to the following: _____, and/or I mailed by United States Postal Service the document to the following non-CM/ECF participants: _____.

Deputy Clerk (or Court Reporter)

Transcript Redaction/Restriction Process Flow

